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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA  
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12 CSE INSURANCE GROUP, )  
13 Plaintiff, ) No. CIV 04-2936 PHX RCB  
14 vs. ) O R D E R  
15 ELECTROLUX, INC., a Delaware )  
16 corporation, et al., )  
17 Defendants. )

18 Plaintiff CSE Insurance Group originally brought this product  
19 liability action in the Superior Court of Arizona in Maricopa  
20 County, seeking recovery of insurance proceeds paid to its insured  
21 following a fire that allegedly was caused by Defendants' products  
22 and destroyed the insured's residence. Compl. (doc. # 1), Ex. A.  
23 Defendants removed the action from the state court based on this  
24 Court's diversity jurisdiction. Notice of Removal (doc. # 1) at 1-  
25 3. A trial before this Court is scheduled to begin on April 10,  
26 2007. Currently before the Court are Defendants' motions in limine  
27 to exclude two reports by Plaintiff's expert, Erik S. Anderson, and  
28 to preclude Mr. Anderson from testifying at trial (doc. # 46); and

1 to exclude Plaintiff's evidence of damages (doc. # 47). The  
2 motions are opposed. See Resp. (doc. ## 48-49). Having carefully  
3 considered the arguments raised, the Court now rules.

4 **I. BACKGROUND**

5 On approximately December 14, 2002, Plaintiff's insured  
6 purchased a freezer from Sears, Roebuck & Co., which was then  
7 plugged into an electrical outlet in the home. Am. Compl. (doc. #  
8 24) ¶¶ 4-5. On approximately December 18, 2002, a fire allegedly  
9 caused by the freezer destroyed the residence of Plaintiff's  
10 insured. Id. ¶ 6. Plaintiff paid its insured the sum of  
11 \$299,491.91 for claimed damages, and brought suit against  
12 Defendants asserting claims of manufacturing, design, and  
13 information defect. Id. ¶¶ 1-18.

14 Plaintiff hired Erik S. Anderson, a forensic engineer and  
15 licensed professional engineer, to investigate the scene of the  
16 fire. Anderson Aff. (doc. # 48) ¶ 1. Anderson issued a report  
17 expressing his opinion "within a reasonable degree of certainty  
18 that the cause of the fire was likely . . . a failure in the  
19 Electrolux freezer present at the time of the fire." Resp. (doc. #  
20 48) at 2; Anderson Aff. (doc. # 48) ¶ 2. Although he could not  
21 point to a specific apparatus in the freezer that may have caused  
22 the fire, Resp. (doc. # 48) at 2, Anderson based his opinion on  
23 "the significant amount of evidence found at the scene of the fire,  
24 the procedures used to collect and test the evidence, and the  
25 application of accepted principles of engineering applied to the  
26 evidence, all in conformity of [sic] reliable scientific principles  
27 and methods . . . ." Anderson Aff. (doc. # 48) ¶ 3. Plaintiff  
28 plans to call Anderson as an expert witness at trial, and to enter

1 his preliminary and final reports into evidence. Final Pretrial  
2 Order (doc. # 44) at 7, 14.

## 3 **II. DISCUSSION**

4 Defendants have filed motions in limine (1) to exclude  
5 Anderson's reports from evidence and to preclude Anderson from  
6 testifying at trial, and (2) to exclude Plaintiff's evidence of  
7 damages. Mot. (doc. ## 46-47).

### 8 **A. Expert Testimony and Reports by Anderson**

9 Defendants argue that Anderson's testimony and reports should  
10 be excluded, because their probative value is substantially  
11 outweighed by the danger of unfair prejudice, confusion of the  
12 issues, or misleading the jury, Mot. (doc. # 46) at 2, and also  
13 suggest that Anderson's opinions are not sufficiently grounded in  
14 facts to qualify him as an expert, id. (citing Guidroz-Brault v.  
15 Mo. Pac. R.R., 254 F.3d 825, 830 (9th Cir. 2001)).<sup>1</sup> Defendants  
16 contend that Anderson's opinions are "pure speculation," pointing  
17 to deposition testimony where Anderson was unable to identify a  
18 specific "apparatus" in the freezer that may have caused an  
19 "electrical failure" or fire. Id. at 2-4.

20 In response, Plaintiff acknowledges that Anderson cannot  
21 identify the specific apparatus responsible for the fire, but  
22 maintains that his expertise, and thus the validity of his opinion,  
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24 <sup>1</sup> Defendants also ask the Court to exclude Anderson's reports  
25 and preclude his testimony pursuant to Fed. R. Evid. 702, and Daubert  
26 v. Merrell Dow Pharmed., Inc., 509 U.S. 579 (1993). Mot. (doc. # 46)  
27 at 2. Because Defendants have not raised any specific legal or  
28 factual arguments that would allow the Court to make an informed  
decision in its "gate-keeping" role at this time, Daubert issues, if  
any, will have to be evaluated at trial prior Plaintiff's proffer of  
evidence.

1 lies in his experience as a forensic investigator and licensed  
2 professional engineer. Resp. (doc. # 48) at 2. Given Anderson's  
3 background, it appears at this juncture that his opinions are  
4 sufficiently grounded in fact and forensic methods. See Guidroz-  
5 Brault, 254 F.3d at 830-31.

6 The Court is also not convinced by Defendants' conclusory  
7 assertion that the probative value of Anderson's testimony and  
8 reports is so substantially outweighed by the danger of unfair  
9 prejudice, confusion of the issues, or misleading the jury that  
10 they must be excluded. As Plaintiff aptly notes, those dangers  
11 will be largely eliminated by Defendants' opportunity for cross-  
12 examination. See Resp. (doc. # 48) at 3. Defendants' motion in  
13 limine to exclude Anderson's reports and preclude his testimony  
14 (doc. # 46) will therefore be denied.

15 **B. Plaintiff's Evidence of Damages**

16 Defendants also seek to exclude Plaintiff's evidence of  
17 damages. Mot. (doc. # 47) at 1-2. Defendants contend that the  
18 loss estimates prepared during the investigation of Plaintiff's  
19 insured's claims are inherently "arbitrary and speculative" due to  
20 Plaintiff's hand in their preparation. Id. They also argue that  
21 Plaintiff has not disclosed any witnesses to lay the necessary  
22 foundation for its evidence of damages. Mot. (doc. # 47) at 1-2.

23 In response, Plaintiff points out that it has already named  
24 two witnesses with requisite knowledge to testify. Resp. (doc. #  
25 49) at 1-2. The Final Pretrial Order (doc. # 44) identifies Kellee  
26 Rose of CSE Insurance Group and Joel T. Gutche of West Tech Claims  
27 and Risk Service, Inc. as fact witnesses for Plaintiff. Rose has  
28 personal knowledge of Plaintiff's payments on its insured's claims

1 resulting from the fire. Rose Affidavit (doc. # 49) ¶¶ 2-3.

2 Although Plaintiff apparently intended to include an affidavit by  
3 Gutche to demonstrate his personal knowledge of the fire damage and  
4 the costs associated with it, see Resp. (doc. # 49) at 2, the Court  
5 has not located any such affidavit. The error is of no consequence  
6 here, because Gutche's personal knowledge is evident from his  
7 identification as the claim adjuster on several pages of damage  
8 estimates attached to Defendants' motion. See Mot. (doc. # 47),  
9 Ex. A. The Court finds that Plaintiff's disclosure of these  
10 witnesses and the demonstration of their personal knowledge  
11 sufficiently addresses Defendants' concern with foundation.

12 Defendants' more substantive argument is that Plaintiff should  
13 not be permitted to prove its damages by relying on its payments to  
14 its insured, or the damage estimates prepared during its  
15 investigation of its insured's claims, due to the inherently "self-  
16 serving" nature of such evidence. See Mot. (doc. # 47) at 1-2.  
17 None of the cases cited by Defendants support this position. See  
18 Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1198-1215 (6th  
19 Cir. 1988) (reducing district court's award of damages in mass  
20 toxic tort case, because causation was not proven with reasonable  
21 medical certainty to demonstrate plaintiffs' present and future  
22 injuries); Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1405-09  
23 (9th Cir. 1993) (Roll, J.) (affirming district court's finding that  
24 plaintiff in trademark infringement action failed to provide  
25 sufficient evidence of its sales history to demonstrate damages);  
26 Gilmore v. Cohen, 95 Ariz. 34, 386 P.2d 81 (1963) (affirming trial  
27 court's rejection of builder's claim for loss of future profits,  
28 because plaintiff failed to provide records of past profits or

1 other evidence to establish future profits with reasonable  
2 certainty); Rancho Pescado, Inc. v. Northwestern Mut. Life Ins.  
3 Co., 140 Ariz. 174, 680 P.2d 1235, 1244-47 (Ct. App. 1984)  
4 (affirming trial court's remittitur of jury award for aspiring  
5 catfish farmer's claim of loss of future profits in a new business,  
6 because plaintiff failed to prove likelihood of success in risky  
7 aquacultural venture with 95% failure rate); Ervco, Inc. v. Texaco  
8 Ref. & Mktg., 422 F. Supp. 2d 1084, 1086-89 (D. Ariz. 2006)  
9 (discussing lack of evidence demonstrating damages in connection  
10 with contractual claim for right of first refusal to purchase real  
11 property). The Court is not aware of any authority that would  
12 prohibit an insurance company, when bringing a claim against a  
13 third party by subrogation or otherwise, from proving its damages  
14 based on its own loss estimates and payments to its insured.  
15 Moreover, the fact that Plaintiff hired an independent adjuster to  
16 investigate its insured's claims diminishes the appearance of bias  
17 suggested by Defendants. See Resp. (doc. # 49) at 2.

18 The parties seem to agree on the uncontroversial proposition  
19 that damages must be established with reasonable certainty. This  
20 does not preclude a plaintiff from relying on its own estimates to  
21 prove damages. This much is clear from the cases cited in  
22 Defendants' motion, none of which fault a plaintiff for attempting  
23 to prove its damages by self-created estimates or studies, but  
24 criticize the failure of the plaintiff to do more in that respect.  
25 Defendants have not shown any reason to question the accuracy or  
26 certainty of the figures established by Plaintiff's estimates or  
27 payments. Although Defendants accurately perceive Plaintiff's  
28 evidence as "self-serving," it is permissibly so. Such is the

1 nature of advocacy in an adversarial system of law.

2 **III. CONCLUSION**

3 In light of the forgoing analysis,

4 IT IS ORDERED that Defendants' motion in limine to exclude the  
5 expert reports and testimony of Erik S. Anderson (doc. # 46) is  
6 DENIED.

7 IT IS FURTHER ORDERED that Defendants' motion in limine to  
8 exclude Plaintiff's evidence of damages (doc. # 47) is DENIED.

9 DATED this 27th day of March, 2007.

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13 Robert C. Broomfield  
14 Senior United States District Judge  
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17 Copies to counsel of record  
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